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No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GARY J. KLIPPERT,

Petitioner,

vs.

THE DEPARTMENT OF DEFENSE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether petitioner, as a 15-year career employee of the federal government, was deprived of due process of law in violation of the Fifth Amendment by his removal from the federal service on the basis of an *ex parte* communication from the petitioner's immediate supervisor to the initial deciding official in the removal action to which petitioner was not afforded prior notice nor an opportunity to respond.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in this action on February 6, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit consists of an unpublished opinion, and is set forth in the Appendix, *infra*. The initial decisions of the Merit Systems Protection Board (MSPB), dated November 29, 1983 is unreported, and the final opin-

ion of the MSPB, dated April 25, 1985 is reported at 27 M.S.P.R. 339 (1985). They are set forth in the Appendix, *infra*.

JURISDICTION OF THE COURT

The judgment of the Court of Appeals for the Federal Circuit, herein sought to be reviewed, was entered on February 6, 1986. On April 29, 1986, Chief Justice Berger extended the time in which this petition could be filed to June 6, 1986. Jurisdiction of this Court to grant the writ is conferred by 28 United States Code, Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED: FIFTH AMENDMENT

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

The petitioner, Gary J. Klippert, is a male, adult citizen of the United States, residing in San Bruno, California.

Petitioner sought review in the court below by petition to review of the final agency decision to remove him from his employment as a Management Analyst, GS-12, with the Defense Contract Audit Agency (DCAA), San Francisco, California.

On May 24, 1985, Petitioner filed a timely petition for review in the court below to review the final order of the Merit Systems Protection Board (MSPB), entered on April 24, 1985, which is found in the Appendix *infra*. That order affirmed the initial decision

of the Washington Regional Office of the Merit Systems Protection Board to remove Petitioner from the federal service, entered on November 29, 1983 and found in the Appendix *infra* 1-25. (The appeal was transferred from the San Francisco Regional Office of the MSPB, to the Washington Regional Office, when the Hearing Officer resigned, after conducting an evidentiary hearing but prior to rendering a recommended decision.)

STATEMENT OF THE FACTS

On April 30, 1982, Petitioner, a fifteen (15) year civil service employee who had a history of more than satisfactory performance reviews, was given his annual performance planning and appraisal by Gregory Zagelow, his immediate supervisor (Agency Adverse Action File, Section II, hereinafter referred to as "AFFII," Tab 4). Petitioner received a numerical rating of 100 which was minimally satisfactory. This was the first time in his fifteen (15) year civil service employment that Petitioner had received a poor performance review. His written comment to this appraisal was that it was detrimental to his career.

On July 20, 1982, Mr. Zagelow told Petitioner that it did not appear Petitioner was in the right kind of work (TI, 103/18-21, Zagelow). Prior to providing a July 23rd interim performance appraisal, Mr. Zagelow had concluded that Petitioner's performance on projects demonstrated that he was not in the right job. He was not in a job that he was able to do (TI, 103/22-25, 104/1-2, Zagelow).

On July 23, 1982, Petitioner received an interim performance appraisal from Gregory Zagelow (AFFII, Tab 5). This document referred Petitioner to two per-

formance standards under one critical element of his job description. These standards mentioned timeliness in completion of assignments. The interim performance appraisal referred to a June 22, 1982, assignment of Mr. Klippert's and asserted it was not completed in a timely manner. Mr. Zagelow stated he was available for consultation as to Mr. Klippert's work methods and advised him to "work harder, and work smarter." The appraisal concluded by stating that it was an official notice to Mr. Klippert that if he did not improve his performance as to timeliness within thirty days he would be either separated or demoted.

On July 28, 1982, Mr. Zagelow assigned five projects to the Petitioner. Mr. Zagelow intended to use these projects to test Petitioner's performance. Mr. Zagelow also instructed Petitioner he was not to have any help, including clerical help, while performing these five tasks.

Mr. Zagelow proposed these five assignments in order to demonstrate whether or not Mr. Klippert was improving in timeliness and, of course, quality, although timeliness was the issue (TI, 69/12-15). Mr. Zagelow was aware that Mr. Klippert was performing his normal duties as well as some that would be considered extra during this same period (TI, 70/2-3). From July 28 to August 23, referred to by the Agency as the thirty (30) day period (TI, 82/16-18), Mr. Zagelow periodically spoke to Mr. Klippert as to his progress (TI, 82/16-18). These conversations were about the specifics of each task and whether or not Mr. Klippert was progressing as Mr. Zagelow intended. As to the correction of Mr. Klippert's performance and other counseling, Mr. Zagelow had

provided him as well as the other employees with the Personnel Management Manual (TII, 134/1-4). He also suggested that Mr. Klippert speak with someone in Personnel (TII, 137/13-19).

On August 23, 1982, Mr. Klippert received a Notice of Proposed Removal for Unsatisfactory Performance signed by Mr. Adachi (AAFII, 6). The notice reviewed the five (5) specific projects assigned to Mr. Klippert on July 28, 1982. The Notice stated that although Mr. Klippert was ". . . offered any and all assistance. . ." his performance was still unsatisfactory. Mr. Adachi proposed removal rather than demotion, because of the critical nature of Mr. Klippert's work and also Mr. Adachi's belief that the quality and timeliness of Mr. Klippert's work would "jeopardize the ability of the Financial Management Division to effectively carry out its mission." (Later at the June 29, 1983, hearing before the San Francisco Regional Office of the Board, Mr. Adachi testified that Mr. Zagelow recommended removal (TI, 20/19–20). In that same hearing, Mr. Adachi also stated, in response to a question as to whether he had given any consideration to another position for petitioner, that the agency was a small organization with limited resources (TI, 43/20–22). He said then that there was no position available for Mr. Klippert in the San Francisco Region (TI, 44/12–16)).

On September 9, 1982, Mr. Klippert replied to the notice of proposed removal in a memorandum to B. Topf, the Deciding Official in this matter (AAFFI, 7). Mr. Klippert vigorously disputed every reference to any untimely performance of an assignment as made in the August 23 Notice of Proposed Removal. Mr. Klippert provided a detailed explanation of each assignment. Many of his explanations made references

to Mr. Zagelow and the absence of a due date in Mr. Zagelow's assignments to Petitioner.

On September 17, 1982, at Mr. Topf's request, Mr. Zagelow delivered a reply to Mr. Klippert's September 9 memorandum (AAFII, 8). His ten (10) page argumentative and opinionated memorandum is a detailed, point-by-point justification for the discharge of the petitioner. Mr. Klippert was not provided a copy of this memorandum.

The presiding official, Bernard Topf, considered Zagelow's memorandum in reaching his decision. He valued Zagelow's opinion. ". . . Greg [Zagelow] has a very responsible position . . . he does a hell of a job and it's a job that's quite a trustworthy job. And I found him to be quite a trustworthy individual. And this influenced my decision." (TI, 226/24-25; 227/1-9, Topf).

On October 10, 1982, Mr. Klippert received the Notification of Decision to Remove Based on Unsatisfactory Performance.

The November 19, 1983 decision from the Washington Regional Office of the Merit Systems Protection Board affirmed the initial decision and sustained Petitioner's removal. (The presiding official from the San Francisco Regional Office who heard the appeal resigned from the agency before making his final decision). The opinion found for the agency on all issues.

On April 24, 1985, the Merit Systems Protection Board affirmed this decision. It found that the *ex parte* communication did not appear to affect the outcome of the action and therefore its admission was not harmful procedural error. It also found that the agency properly established Petitioner's performance standards. The Board found that as the initial decision

was not based upon credibility determinations there was no merit to Petitioner's argument that he was entitled to a hearing and an initial decision before the same presiding official. Finally, it held that the presiding official did not err when applying the substantial evidence test.

The Court of Appeals rejected petitioners arguments solely on the basis of the decisions of the MSPB. Appendix, *infra*.

SUMMARY OF ARGUMENT

Petitioner was denied due process of the law, as required by the Fifth Amendment of the United States Constitution, in that the first hearing official for the agency relied on an *ex parte* communication that contained information detrimental to Petitioner, and petitioner was not provided prior notice of the receipt of that memorandum or an opportunity to respond.

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED BECAUSE PETITIONER WAS NOT AFFORDED AN OPPORTUNITY TO RESPOND TO NEGATIVE INFORMATION ABOUT HIS JOB PERFORMANCE SUPPLIED BY AN ADVERSARY OR NOTICE OF THE EXISTENCE OF SUCH INFORMATION PRIOR TO THE INITIAL DECISION TO REMOVE HIM FROM HIS POSITION IN VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT

In Cleveland Board of Education v. Loudermill, _ U.S. ___, 105, S. Ct. 1487 (1985), this Court held that a public employee could not be deprived of his of her employment except pursuant to constitutionally

adequate procedures. An opportunity to respond and notice were held essential to due process.

There, the public employee, a security guard who had been employed by the school board for eleven months, was removed from his position for alledgedly making a false statement on his employment application. He had stated that he had never been convicted of a felony. During a routine investigation, the Board discovered that the employee had been convicted of a felony, grand larceny. The Board dismissed the employee without affording him a pretermination opportunity to respond or notice that his employment would be terminated. In subsequent adjudactive hearings, the employee claimed that he had thought, at the time he completed his employment application, that he had only been convicted of a misdemeanor.

The petitioner likewise asserts a claim that he was deprived of due process by the receipt of an *ex parte* memorandum by the initial deciding official from an adversary to which the petitioner was neither afforded notice of its existence nor an opportunity to respond prior to his removal from the federal service. Thus, certiorari should be granted to decide the all important question of the entitlement of federal employees to prior notice and an oportunity to respond to *ex parte* communications in removal proceedings.

The issue is freighted with mixed interests. On the one hand, supervisory officials who make adverse personnel decisions are required to investigate and receive information from subordinates. On the other hand, the employee has an interest in receiving notice and an opportunity to respond to communications from an adversary prior to being terminated.

The MSPB and the Court of Appeals failed to recognize that petitioner's entitlement to due process is of constitutional origin and disregarded decisions of that court and other circuit courts. *Sullivan* v. *Department of the Navy*, 720 I 2d 1266 (Fed. Cir., 1983); and *Camero* v. *United States*, 375 F 2d, 777 (Ct. Cl. 1967).

Sullivan and *Camero* hold that *ex parte* communications by an adversary with those making the decision to remove a government employee from his employment invalidates the removal proceedings. *Sullivan*, at 1271. *Camero*, at 791.

In *Camero*, an attorney advisor to the deciding official requested an opinion from a Mr. Kostos, the attorney representing the agency, as to how Camero's grievance should be resolved. The court found that Kostos ". . . had, as an adversary, more than a neutral stake in the final outcome of plaintiff's case." at 780. The court stated,

> "It is difficult to image a more serious incursion on fairness than to permit the representative of one of the parties to privately communicate his recommendations to the decision makers. To allow such activity would be to render the hearing virtually meaningless. We are of the opinion that due process forbids it." at 781.

Petitioner is in the same position as *Camero*. The deciding official, Topf, requested Mr. Zagelow, the agency person supervising the Petitioner and the one who initiated the proposal to remove, to comment. Zagelow here, as did Kostos in *Camero* had "more

than a neutral stake in the final outcome." The argumentative and opinionated *ex parte* memorandum demonstrates this. The subsequent decision by Topf violated petitioner's right to procedural due process.

Sullivan provides a more detailed explanation of the wrong that arises from an *ex parte* communication. Referring to *Ryder v. United States*, 585 F.2d 482 (1978) the Sullivan court stated that ". . . the error is committed when the *ex parte* statements are made to the first deciding official who could decide the case in favor of the employee." at 1273. It makes no difference that at a later time in the administrative proceedings the wronged employee is made aware of the *ex parte* communication and given an opportunity to rebut it. It is then too late. "[Petitioner] . . . has irretrievably lost his valuable opportunity, explicitly given him by the regulations, to have [the deciding official] . . . decide finally in his favor, untrammeled by improper *ex parte* approaches." *Sullivan*, at 1273 (citations omitted).

As in *Sullivan*, Petitioner Klippert, upon Topf's receipt of Zagelow's memorandum, "irretrievably lost his valuable opportunity, explicitly given him by the regulations. . ." to have Topf decide this matter without contamination by an *ex parte* unanswered communication from Klippert's adversary.

It is a well settled matter in administrative proceedings that an *ex parte* communication from an agency partisan concerning the merits of the matter under decision is a violation of due process. *Doe v. Hampton*, 566 F.2d 265 (D.C. Cir., 1977). The *ex parte* memorandum from Zagelow to Topf created such a violation. Zagelow was not providing information to Topf. His memorandum was, as stated in *Doe*, a

". . . self-serving contact initiated by an interested party . . . to proffer further justification for its actions. . ." (The fact that Topf requested the memorandum does not cure it.) Topf was *not* investigating, i.e., seeking additional explanations or new evidence. Topf specifically requested the opinion of a trustworthy, responsible person (TI, 226/23-25; 227/1-9, Topf). He refused to make the decision without Zagelow's opinion (". . . I had to get into that [Zagelow's memorandum]).

It is the failure to understand both the nature of the memorandum and the degree of reliance by Topf on Zagelow's memorandum that flaws the decisions of the Washington Office, Merit Systems Protection Board, and the court below.

The decision by the Washington office mistakenly cites *Peden v. United States*, 512 F.2d 1099 (Ct.Cl. 1975) as standing for the proposition that the deciding person in a removal action may conduct a further review. *Peden* in fact stands for the proposition that a deciding person who has knowledge of relevant evidence is not required to have reduced the evidence to writing before relying upon it. (*Peden* involved a concurrent criminal investigation and removal of an Internal Revenue Service special agent. The IRS District Director who removed the agent received daily briefings of the investigation into his criminal activities but made no physical file of these discussions.)

The Washington office finding that Petitioner's ability to review the ex parte communication *after* Topf's decision (but prior to the appeal to the San Francisco office) cured the error flies in the face of *Sullivan* and other similar cases. *Sullivan*, referring to *Ryder v. United States*, *supra*, states that ". . . the error is

committed when the *ex parte* statements are made to the first deciding official who could decide the case in favor of the employee." at 1273. The employee looses forever, at that moment, the right to have a decision made in his or her favor without a taint of any improper interference. The same procedural error that occurred in *Sullivan* occurred here when Topf received Zagelow's memorandum. Petitioner never had the opportunity to have Topf decide this matter without the contamination of Zagelow's opinion.

The Washington office also erred by concluding that the harm, if any, in the memorandum arose from its provision of ". . . examples of unacceptable performance other than those discussed. . ."(November 29, 1983 decision of the Washington office, App., at 22a) To the contrary, the harm arising from that ex parte memorandum came from its judgmental and opinionated approach. This judgmental and personalized approach, combined with the high regard in which the deciding official, Mr. Topf, held the drafter of the memorandum, Mr. Zagelow, made the document one that was persuasive and compelling. Petitioner had no opportunity to review it and combat it.

The Merit Systems Protection Board's opinion errs in a similar manner. It first refers to cases which permit informal contacts between the agency and the deciding official. However, this is not a mere investigative contact, designed to uncover other viewpoints. This was a judgmental memorandum full of value loaded words and phrases. These words and phrases were not objective. They clearly showed Mr. Zagelow's poor opinion of Petitioner. Mr. Zagelow was a person whom the deciding official relied upon in making his decision.

In its opinion, the Board incorrectly interprets *Andersen v. Department of State*, 27 M.S.P.R. 344 (1985). In fact, the standards listed in *Andersen* are met in this matter. The memorandum provided new evidence which was considered by Topf, i.e., the true nature of Zagelow's attitude toward Petitioner. This new evidence influenced Topf. Topf may have very well come to a different conclusion without this highly prejudicial memorandum written by a person he found trustworthy and responsible, a person without whose opinion he could not decide this matter.

The principle of administrative procedure forbidding *ex parte* contact between an agency partisan and a subject of agency action is followed in nonemployment matters as well. For instance, in *United States v. Cabbage*, 430 F.2d 1037 (6th Cir., 1970) a selective service matter, the court found that the inclusion of a law enforcement report in the Selective Service file without the appellant's knowledge or notice to him was a ". . . denial of a fair hearing required by the due process clause of the Federal Constitution. . ." at 1041. That court also found, quoting from another case, that

> "Inherent in the most narrow view of due process is the right to know of adverse evidence and the opportunity to rebut its truth and relevance. *Chernekoff v. United States*, 219 F.2d 721 (9th Cir., 1955)."

That quotation from *United States v. Owens*, 415 F.2d 383 (8th Cir., 1969) points out the harm such an ex parte communication can do, even a communication that does not contain the key to the matter at hand.

> "While the information complained of is less than inflammatory, it is clearly adverse and prejudicial, and we have no way of deter-

> mining the weight and credibility attached to it by the Department of Justice and the appeal board."

In this matter, the *ex parte* memorandum *was* inflammatory, adverse and prejudicial. We know that Topf found it credible and attached great weight to it. The Merit Systems Protection Board, as did the Washington office and the court below, erred in its failure to understand that this mere use of an *ex parte* communication, with its inflammatory contents and nature, tainted the hearing.

Another example of the legal principle that partisan *ex parte* contacts during administrative proceedings are violative of our principles of procedural due process and fair hearings is found in *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir., 1959). That court found a letter from an applicant for a television channel to the members of the Federal Communications Commission was improper as it did not go into the public record and opposing parties were unaware of it.

The Merit System Protection Board erred in finding that the *ex parte* communication was not harmful. An *ex parte* communication is harmful and violative of procedural due process when "a decision is made, at least in part, on the basis of the *ex parte* communication [from a person who is an adversary and] . . . has more than a neutral stake in the final outcome of plaintiff's case" *Sullivan*, *supra*, quoting *Camero v. United States*, *supra*. The lack of substantive fairness occurs when the agent of one of the parties communicates information that is not neutral or objective to the decision maker. *Sullivan*, 1271. This same standard is applied by the Merit Systems Pro-

tection Board. In *Andersen v. Department of State*, *supra*, the Board stated that its:

> "... concern ... is directed specifically to whether the deciding official predicated his or her ultimate decision ... the information contained advance written notice and not in additional allegations or information,. . . ."

Andersen unaccountably refuses to recognize the constitutional basis for objections to *ex parte* communications and on this point the opinion is wrong and incorrectly decided. The Board opinion in this matter, where it follows *Andersen*, is also incorrectly decided. Bernard Topf, the deciding official, clearly stated that his opinion was based, in part, upon Zagelow's September 17 *ex parte* memorandum. He felt it was necessary in reaching his decision to review and consider Zagelow's response to Petitioner's reply to the notice of proposed removal. He considered it because of his respect and admiration for Mr. Zagelow. Topf's use of Zagelow's *ex parte* communication was harmful error, as set forth in *Andersen*, *supra*. The *ex parte* communication introduced information: "... 1) ... which the appellant has not had the benefit of reviewing and responding to; 2) that the deciding official was influenced by the ... information in his ... decision making process; and 3) that the procedural error of considering the ... information likely had a harmful effect upon the outcome."

The *ex parte* communication was a violation of Petitioner's right to procedural due process and on this basis the judgment below must be reversed.

In the Court of Appeals, the respondent attempted to distinguish petitioner's claim that the receipt and

consideration of the Zagelow Memorandum by the deciding official without providing petitioner notice that he had done so or an opportunity to respond deprived petitioner of due process of law in violation of the Fifth Amendment. Respondent cited three (3) cases in support of its argument: *Welcker v. United States*, 752 F.2d 1577 (Fed. Cir., 1985); *Depte v. United States*, 715 F.2d 1481 (Fed. Cir., 1983); and *DeSarno v. Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir., 1985). Neither of these three (3) cases can be applied to this petition, and each of them is distinguishable.

Welcker involved an ancient dispute which was controlled by the unique procedures utilized over thirty-five (35) years ago to remove persons from sensitive government positions thought to be a risk to the security interests of the United States. Welcker claimed that he had been solicited by the FBI and an Army intelligence officer to infiltrate and report on the activities of a certain club which was suspected of being a communist-front organization.

In 1949, the Air Force suspended Welcker for disloyalty pursuant to the provisions of Public Law 77-808. However, the procedures which existed under the Act of August 24, 1912, 5 United States Code, Section 652, for the protection of employees threatened with loss of their employment with the federal government were not applicable to employees such as Welcker who were considered risks to the national security. Summary removal was decreed by statute and was the order of the day.

Following enactment of the Privacy Act in 1979, 5 United States Code, Section 552a, Welcker obtained a copy of his FBI files. Welcker then brought a suit

under the Tucker Act, 28 United States Code, Section 2501, for wrongful dismissal from the federal service. In that suit, he claimed that the FBI and the Department of Justice had deliberately withheld from the Air Force evidence of their role in allegedly inducing him to infiltrate a communist-front organization at the time of his removal from federal service in 1949.

The Court of Appeals rejected Welcker's argument that his cause of action was not based *per se* on the wrongful discharge, "but rather on the alleged impermissible *ex parte* communications from the FBI to the Air Force at the time of the hearings" (752 F.2d, at 1582). The court gave two (2) reasons for rejecting his claim. One, that Welcker's action was necessarily one for wrongful dismissal as opposed to a tort action for wrongfully withholding information. The other reason stated by the Court was that "the rule against such contacts is inapplicable to this loyalty security case." The latter ground was underscored by the observation that precedents which preclude the use of such *ex parte* communications in adverse employment actions are grounded on the rule "that by seeking the advice of an adverse party the decision maker had violated applicable regulations." (752 F.2d, at 1582). The court concluded its ruling on Welcker's claim that the *ex parte* communication violated his rights with the statement that he did not enjoy the benefit of any "such regulations or *practice* under Public Law 77-808." (Emphasis added)

Depte v. United States, 715 F.2d 1484 (Fed. Cir., 1983) involved an inartfully pled case. There, the employee who had been inappropriately disciplined for alleged theft of property from the Veterans' Admin-

istration claimed that her rights had been violated merely due to the fact that the deciding official had discussed the case with another police officer who was present at the crime scene. Mrs. Depte's claim failed, because she could not identify any rule or regulation which prohibited the deciding offical from collecting evidence. The statute upon which Mrs. Depte relied, 5 United States Code, Section 2302(b)(2), did not apply to her case. Section 2302(b)(2) does not prohibit a deciding official from soliciting the views of a person who has personal knowledge of the events which gave rise to the notice of proposed adverse action.

In *Depte*, there was no indication that the second police officer was attempting to influence the outcome of the case as opposed to merely relating to the deciding official what he had seen. Here, the deciding official was not seeking new evidence or additional explanations. He was seeking the opinion of a trustworthy person to help him make the decision that he alone was required to make. Moreover, petitioner was unaware of the Zagelow Memorandum and was thereby deprived of an opportunity to respond. Zagelow's Memorandum cut at the heart of petitioner's explanation and justification of his job performance. Zagelow stated in his memorandum, among other things, in reply to the petitioner's oral defense that, "In my opinion, Mr. Klippert's statements are unfounded and unsupported." (White, Res. App. at 3). The denial of petitioner's fundamental right to due process is apparent, for Zagelow's comments are neither neutral nor objective. (See, *Sullivan*, *supra*, at 1271)

Respondent's reliance upon *DeSarno v. Department of Commerce*, *supra*, was misplaced. The *ex parte* com-

munication claim failed, because the communication that was in issue was received by the deciding official during the initial phases of the investigation. DeSarno's co-worker, Green, informed the deciding official of his suspicions at a stage when the deciding official was still hopeful of resolving the matter informally and prior to *DeSarno* having made his oral reply. (See, 761 F.2d at 659)

THE MEMORANDUM WAS HARMFUL AND WAS CLEARLY ADVERSARIAL

Petitioner has discussed the authorities which deal with harmful procedural error in this context, *supra*, but the harm which the petitioner suffered is apparent from the facts as well.

The September 17, 1982, memorandum from Gregory Zagelow to Bernard Topf was argumentative, opinionated and adversarial. It presented new facts, as well as a point-by-point denial of Petitioner's September 9, 1982 reply to the Notice of Proposed Removal. In petitioner's oral reply, the lack of timeliness criticisms were answered by Petitioner's stating that Mr. Zagelow never provided him with a due date for projects. Mr. Zagelow apparently took the reply in a personal manner. In his memorandum, Zagelow refutes Petitioner's statements point by point, often through the use of sarcastic or other personal remarks. There is no attempt to present a neutral factual statement. The memorandum is full of loaded words and phrases such as "obviously" "at no time" "I was forced" "Mr. Klippert has not refuted", et cetera. Mr. Zagelow also made remarks about the quality of Mr. Klippert's performance.

Among the remarks Mr. Zagelow made about petitioner are the following:

". . . Mr. Klippert had consumed 9 workdays to produce an amount of work equivalent to what had taken me 2 workdays", page 3.

". . . the projects assigned to Mr. Klippert would not . . . be considered management analysis work of a GS-12 grade . . . one would expect him to complete them timely or offer a reasonable explanation . . . Mr. Klippert did neither.", page 4.

"In my opinion, Mr. Klippert's statements are unfounded and unsupported.", page 5.

"To conclude that asking Mr. Klippert to process MIS data and reports distribution by himself established such an artificial and arduous condition as to prompt his failure must be viewed in light of the fact that this task has been frequently accomplished by a GW-2 Clerk Typist."

"Thus, Mr. Klippert's comment cannot be correct," page 6.

"The only projects assigned . . . were three extremely simple tasks.", page 6.

"This project could easily be accomplished during normal working hours . . . Clearly Mr. Klippert's comments are not supported by the facts.", page 7.

"The simple task . . . the only project assigned to Mr. Klippert which *required* action . . . can hardly be construed as increasing Mr. Klippert's responsibilities.", page 7

"One must bear in mind that Mr. Klippert is a GS-12. One should be able to expect successful completion of such a menial task by a GS-12 without

the need to call a meeting and, with dictionary in hand, assure the semantic definition of each word used when assigning the project."

"Obviously, I intended that Mr. Klippert produce . . . It was foolish for him to think otherwise. Put another way, Mr. Klippert's literal interpretation of proofread could be read as follows:

> "Please assure that every error of content noted in the draft is preserved in the final published version."

The *ex parte* memorandum contradicted these statements in the July 23, 1982 Interim Performance Appraisal and the August 23, 1982 Notice of Proposed Removal which state that timely completion of assignments was critical to Mr. Klippert's status. Zagelow stated that the main concern with Mr. Klippert's performance was the "*excessive amount of time consumed without explanation*" (Case Docket, Vol. Three, Tab 8, page one, emphasis in the original). Mr. Zagelow stated that the excess time ". . . obliged me to formally inform him that his performance must improve. . . . Thus the *question of due dates is not the central issue.*" (Case Docket, *supra*, emphasis added).

The matter of due dates is referred to again and again, often in a contradictory manner. Mr. Zagelow states he assigned due dates. He then contradicts himself by stating he did not. On page 4 of the same document, Mr. Zagelow writes, "The assertion that I don't assign due dates for project completion is false. That he was assigned the project and was given specific due dates is clear." On page six of this document, in reference to the five tasks, Mr. Zagelow

states: ". . . it was clearly explained to Mr. Klippert that the nature of the projects were such that establishment of due dates was not warranted and that instead reasonable estimates of time required. . ." On that same page, in the last paragraph he stated: ". . . no due dates were prescribed for projects assigned on 28 July."

The Agency received Zagelow's *ex parte* memorandum prior to its September 30, 1982, meeting with Petitioner and his representative. Bernard Topf, the Deciding Official, considered the ex parte document. He considered it because he knew Mr. Zagelow is a trustworthy individual. He also considered it because the technique Mr. Topf used in reaching his decision was to compare each item of evidence against a rebutting item.

Topf said that ". . . there were a few itmes [sic] in there where it would be Greg's opinion versus Gary's opinion I guess I have to say that Greg has a very responsible position . . . he does a hell of a job and it's a job that's quite a trustworthy job. and I found him to be quite a trustworthy individual. And this influenced my decision." (TI, 226/24-25; 227/1-9, Topf).

Petitioner was unaware of the memorandum, and he was not afforded an opportunity to respond. Thus, petitioner was clearly harmed by Zagelow's *ex parte* communication.

PETITIONER HAD A PROPERTY INTEREST IN HIS EMPLOYMENT

Petitioner, as a 15-year career employee of the federal service, had a cognizable liberty or property interest in his employment. *Board of Regents v. Roth*

408 U.S. 564 (1972); and *Orloff v. Cleland*, 708 F.2d 373, 379 (9th Cir. 1983).

CONCLUSION

For the reasons stated, petitioner respectfully submits that the writ prayed for should issue.

Respectfully submitted,

HOWARD MOORE, JR.
JANE BOND MOORE
445 Bellevue Avenue, Third Floor
Oakland, California 94610
Attorneys for Petitioner

June 6, 1986

APPENDIX

APPENDIX A

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

Appeal No. 85-2550

GARY J. KLIPPERT,

Petitioner,

v.

DEPARTMENT OF DEFENSE

Respondent.

DECIDED: February 6, 1986

Before MARKEY, *Chief Judge*, SMITH and NEWMAN, *Circuit Judges*.

PER CURIAM.

The final decision of the Merit Systems Protection Board (board), docket No. SF04328310269 (Apr. 24, 1985), affirmed the board's initial decision (Nov. 29 1983) to sustain the Defense Contract Audit Agency's removal of Gary J. Klippert (Klippert) from the position of management analyst because of unacceptable performance. Klippert's ar-

guments are adequately addressed in the board's opinions dated November 29, 1983, and April 24, 1985. The board's final decision is *affirmed* on the basis of the opinions below.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

CASE NO. SF04328310269

GARY J. KLIPPERT
v.

DEFENSE CONTRACT AUDIT AGENCY
DATE NOV 29 1983

INTRODUCTION

On December 16, 1982, the appellant filed a petition for appeal from the action of the Department of Defense, Defense Contract Audit Agency (DCAA), removing him because of unacceptable performance effective December 3, 1982. As an employee in the competitive civil service who was not serving a probationary period, the appellant was entitled to appeal to the Board from a removal action taken under 5 U.S.C. Section 4303. The appeal is, therefore, now properly before the Board for adjudication.[1]

ANALYSIS AND FINDINGS

The appellant was employed as a Management Analyst, GS-343-12, at the DCAA, Office of the San Francisco Re-

---

[1] This appeal was filed with the Board's San Francisco Regional Office. A presiding official of that office heard this case at the request of the agency. That presiding official is no longer employed with the Board. The undersigned presiding official was then assigned to this case. My decision is based upon a review of the entire record developed on appeal, including the transcript of the hearing.

gional Resources Manager, Financial Mangement Division. His removal was proposed on September 17, 1982, by his division chief, G.A. Zagelow. The appellant made oral and written replies. On October 1, 1982, a higher level official, B. Topf, the Regional Director, decided that the appellant's performance was unacceptable and that the appellant's performance deficiencies were such that removal was appropriate.

In an action based upon unacceptable performance and taken under 5 U.S.C. Section 4303 and 5 C.F.R., Part 432, the agency's burden of proof is to support its decision by substantial evidence. The board has defined substantial evidence as "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true." 5 C.F.R. Section 1201.56(c)(1).

The appellant's position had three critical performance elements. His removal was based upon alleged failure to meet the performance standards for one of the three critical elements, "Analysis Section Program Accomplishment."

The record contains information that he received a warning his performance was unsatisfactory in this element on July 23, 1982. The appellant's performance had been evaluated in March, 1982, and found minimally satisfactory. His performance in the new rating period; however, fell below satisfactory and the appellant was given thirty (30) days to improve his performance. Mr. Zagelow found his performance had not improved and thus proposed the appellant's removal. The agency presented the testimony of a subordinate of the appellant and of his supervisors, as well as copies of the documents which formed the basis for the determination that the appellant was not meeting the performance standards for the critical element.

On appeal, the appellant contends that the agency failed to communicate the performance standard to him. In this regard, the appellant argued that the standard prepared

by the agency was vague and did not put him on notice "as to specifically what was required of him by the timeliness standard." The performance standard for the critical element at issue provides as follows:

> A. Incumbent's performance will be evaluated with heavy emphasis on the degree to which his section accomplishes its planned objectives, responds to changing conditions by weighing the relative merits of alternatives, and takes timely action to realign priorities. The more significant program areas are: management analysis/review, systems analysis, and management information systems. Higher levels of performance imply the completion of significant activity plan objectives despite changes in conditions (staff shortages, unforeseen workload increases, major unforeseen problems) or timely completion of all significant activity plan objectives under static conditions, all at a high quality level. (Weight 15)
>
> B. Incubment's performance will also be evaluated based on timeliness and accuracy of advice rendered in the resolution of current problems, responsiveness to inquiries, projects and assignments from the Financial Manager, other Regional Office Elements and DCAA HQ, and compliance with management information processing due dates. Satisfactory performance implies timely response and resolution of problems and compliance with management information processing due date. Higher levels of performance imply consistent, aggressive completion of all necessary work at a high standard of quality. (Weight 15)

C. Incumbent's performance will also be evaluated based on the specific requirements associated with assigned program responsibilities falling outside of the program analysis, systems analysis, or management information systems areas. Satisfactory performance implies successful accomplishment of specifically identified program goals at a high level of competence. Higher levels of performance imply aggressive completion of all program requirements. (Weight 10)

The appellant contends that although the above standard does mention timeliness, it neither indicates what percentage of work must be timely, nor how late is untimely, and does not constitute the objective creterion required by 5 U.S.C. Section 4302(b)(1) and 5 C.F.R. Section 4302.202(d). The appellant agrees that his supervisor, G. Zagelow, provided the standard to him in early 1982. The agency contends that the standard is understandable to a reasonable person and the "due dates" are established for each individual project and work item. The Board has stated that agencies have considerable flexibility in devising methods for assessing performance and that the scope of its review in a challenge under 5 U.S.C. Section 4302(b)(1), is limited to determining whether the agency has abused its discretion in establishing the standards at issue so as to cause harm to the employee to whom the standards were applied. *Siegelman v. U.S. Department of Housing and Urban Development*, MSPB Docket No. DC04328110293 (January 10, 1983). In this case, I find that the evidence of record reflects that the appellant participated in the development of his specific performance standards based upon models provided by the agency's headquarters. At that time and when he was evaluated, he voiced no dissatisfaction with this particular standard and its timeliness measurement. I further find that various time standards and deadlines for the appellant's assign-

ments existed and that he was generally aware of them. See, e.g., Agency Exhibit #5 and testimony of Mr. Ray. Accordingly, I find that the agency was not unreasonable in establishing the above performance standards, and that the appellant was not harmed by the defect he cites as he was repeatedly informed of his work deficiency in this area.

Next, the appellant asserts that the agency failed to provide him a reasonable opportunity to demonstrate acceptable performance. He argued that the lack of an objective performance standard, as discussed above, combined with the facts that he was informed at the beginning of the improvement period, he was told he should look for other employment, that he was given special "test" assignments, he was given no due dates other than the thirty (30) days for improvement, and that the proposing official determined that he was not improving after only nineteen (19) days, denied him any genuine opportunity to improve. My review of the record demonstrates that the appellant received a marginally satisfactory performance appraisal and discussions about it established that the critical element discussed above was the one in which he needed to improve. In July, 1982, Mr. Zagelow found the appellant had been untimely with regard to a project due July 16, 1982. He then issued the interim performance appraisal in which he informed the appellant that his performance in the Analysis Section Program Accomplishment critical element had become unsatisfactory. The appellant was issued a notice on July 23, 1982, which informed him that he would be given thirty (30) days in which to improve his performance and that if he did not, removal or demotion might be undertaken. The appellant was assigned five tasks to complete during this period (four of the assignments were given him on July 28th and done on either July 28th or July 30th). He was informed when he was given the assignments that they would be carefully evaluated to determine whether his performance had improved. Mr. Za-

gelow determined that the appellant's performance had not improved and with the concurrence of the appellant's second level supervisor, Mr. Adachi, proposed his removal on August 23, 1982.

In consideration of the above sequence of events, I find that the appellant was or should have been aware that his supervisor was having problems with the timeliness of his performance. As found above, while not particularly objective measurements, the appellant did have performance standards which reasonably informed him of what would constitute acceptable performance in this element. As concerns the time given him, OPM has defined the relevant terms as follows:

> Opportunity to demonstrate acceptable performance means a chance for the employee to show that he or she can meet established minimum performance standards for the critical elements of the job.
>
> Reasonable time as used in Section 432.203(b) of this subpart means an amount of time commensurate with the duties and responsibilities of the employee's job which is sufficient to allow the employee to show whether he or she can meet minimum performance standards.

5 C.F.R. Section 432.202.

The appellant asserts he was not given a reasonable time because Mr. Zagelow had decided at the outset that his performance was unacceptable and because he actually got only about twenty (20) days to show improvement instead of the stated thirty (30) days. Other than the appellant's assertion that he was advised to look for other employment, I find no indication that Mr. Zagelow had predetermined the outcome of the appellant's improvement attempts. The evidence of record supports a contrary conclusion in that Mr. Zagelow devised special assignments

for the appellant on which to judge his performance during the period and because he consulted with Mr. Adahi to obtain his concurrence with any action. Through the testimony of Mr. Zagelow and Mr. Adachi, it was established that they met to discuss the appellant's performance sometime during the week before the August 23rd proposal was issued. Accordingly, I find that the evidence of record indicates that had the appellant performed acceptably in Mr. Zagelow's view or improved up to the time his response to the proposal was considered by Mr. Topf, the agency could have determined that no action or a less severe action was appropriate. Furthermore, I find that by the time of the August 23rd proposal, the appellant had acted in some manner on all five of the assignments given him in July. Having done so, I find that he was give a "reasonable time" within the meaning of 5 C.F.R. Section 432.202. In fact, the interim appraisal stated the appellant had to improve his performance over the "next thirty (30) days" to avoid remedial action. From July 23 to August 23, the appellant essentially had about thirty (30) days to show improvement. I find no error in this regard and no harm to the appellant from the procedures used. The assertions that it was improper to give the appellant "special" assignments will be considered below.

The law and regulations require that an agency identify specific examples of unacceptable performance in any critical element which an employee does not meet. Here, the examples of unacceptable performance were those assignments which the appellant was to complete during the improvement period. Specifically, they were the following:

1. You were asked to distribute Management Year (MY) 82 final performance and variance reports to the Regional Office staff, a project estimated to take 4 hours to complete. On 30 July you indicated that you had spent most of the day distributing reports to our field audit

offices, and that you had been surprised to find that this had not already been done. You expressed concern that you might not be able to find enough copies of these reports to effect distribution to the Regional Office staff.

Of concern here is the fact that you were not aware of the status of the MIS reports distribution. Field audit offices are required to prepare narrative reports covering their MY 82 operations within 90 days of receipt of the performance reports. Thus it is important that they receive the reports as soon as possible. These reports had, however, been in the Regional Office for almost two weeks, and although you are responsible for compliance with management information processing due date (see Standard B above) you were completely unaware that these vital reports had, as yet, not been distributed. This failure to timely distribute the MY 82 performance reports, when measured against the timeliness criterion of your performance standards, represents unsatisfactory performance with regard to this project.

2. You were asked to process July 1982 data into the MIS, a project estimated to require at most 16 hours to complete. Data began arriving in the Regional Office on 2 August 1982 and continued to arrive throughout that week. Although our procedures call for sending MIS data to keypunch as soon as it is received at the Regional Office, by 9 August you had allowed approximately 5,000 lines of data to accumulate without batching and processing to the keypunch contractor. This, in turn, created a bottleneck at the keypunch contractor (who can normally process only 3,000 lines of data

per day) and significantly lengthened the time frame for processing the July data into the MIS. When questioned, you were unable to provide any reason to explain why you had not processed this data in a timely manner. Therefore, this failure to timely process MIS data, when measured against the timeliness criterion on your performance standards, represents unsatisfactory performance with regard to this project.

3. You were asked to proof read a draft listing of directory changes. This listing was to be provided to the field audit offices to notify them of changes in the addresses, phone numbers, and other information regarding several of our offices. The final listing was published on 6 August 1982, and a review of the listing by your supervisor on 9 August disclosed numerous errors. Therefore, your failure to complete this project accurately, when measured against the quality criterion of your performance standards, represents unsatisfactory performance with regard to this project.

4. You were asked to solicit from the Regional Director and the Deputy Regional Director comments regarding the adequacy of the monthly performance report format, make whatever changes in the format were requested, and proceed to post the MY 83 Program Plan data. In addition, you were to draft a memorandum to DCAA Headquarters requesting that these manually prepared reports be computerized, thus saving the Division considerable effort in the future. Since DCAA Headquarters would require considerable lead time to prepare its computer programs to produce such an automated report, it was impor-

tant that you complete your review of the format and prepare the transmittal memorandum as quickly as possible.

When your supervisor inquired on 19 August regarding the status of this project, you indicated that the Director had informed you that, due to the press of other priority business, he would be unable to privide you with the format changes which he wished within the near future. This in turn prevented your timely undating of the reports and drafting of the transmittal memorandum. Although specifically identified in your supervisor's 23 July 1982 memorandum as an area in which improvement in performance was required, when confronted with circumstances which in all likelihood would preclude your timely completion of this project, you nonetheless failed to advise your supervisor of these circumstances so that alternatives could be developed. Therefore, your failure to complete this project within the time frame provided, as well as your failure to bring to your supervisor's attention your lack of progress, when measured against the timeliness criterion of your performance standards, represents unsatisfactory performance with regard to this project.

5. You were asked to prepare report formats for the Deputy Regional Director and, after securing his approval of the report format content, to post data and provide completed reports to the Deputy Regional Director. Sufficient time was available during the 30-day period for timely completion of this project; however, the assignment was not completed. As was the case in the project cited in paragraph 4 above, you made no attempt to no-

> tify your supervisor that circumstances would, in all likelihood, prevent your timely completion of this project, and this prevented your supervisor from taking necessary action. Therefore, your failure to complete this project, and this prevented your supervisor from taking necessary action. Therefore, your failure to complete this project in a timely manner, and your failure to notify your supervisor of your lack of progress, when measured against the timeliness criterion of your performance standards, represent unsatisfactory performance with regard to this project.

With regard to item 1 above, the appellant testified that he completed the distribution to the regional office staff and Mr. Zagelow testified this was so. The concern in this reason is, rather, that in doing this assignment, the appellant first became aware of the failure to distribute to the field offices. The record reflects that the distribution was normally the responsibility of Ms. Ray, a GS-11 Management Analyst for whom the appellant served as team leader. Ms. Ray had made a partial distribution about July 21st. Thereafter, she was preparing for a conference, attending the conference in Washington, D.C., and on vacation until August 9, 1982. As Ms. Ray's team leader the appellant should have been aware of the state of her assignments and in her absence insured that the materials were distributed in a timely fashion. I find substantial evidence supports the agency's determination that the appellant did not do this.

There was considerable testimony concerning item 2. Ms. Ray in particular testified that when she returned to the office on August 9th, she found this data in disarray. The appellant testified that he was "batching" the data, that his Friday batch had not been picked up by the messenger, and that his method would have resulted in the material being keypunched within a day or two of its normal com-

pletion date. Despite the appellant's argument that this did not "significantly" lengthen the processing time, the agency has presented substantial evidence that the appellant did not complete this assignment in a timely manner.

With regard to item 3, the appellant contends that he did the assignment and that any errors in the product were in the draft. There is some dispute on what review the appellant was to provide when he "proofed" the directory. Ms. Ray testified that she would submit a draft to be typed on or in the WANG computer. Had she been there, she would have read the item for format, content, and typographical errors. In her absence the assignment was given to the appellant. Review of the directory draft reflects that a number of items originally marked as errors by Mr. Zagelow were later determined not to be erroneous. In addition, some of the errors were in fact errors which were in the original draft. Additionally, the assignment was given to the appellant by giving him the draft, as typed, with a note to "proof." In view of the fact that the appellant was being given assignments which he normally did not perform, I find that the agency should have made clear exactly what the appellant's assignment and responsibility with regard to this matter were. Accordingly, I do not find this example of unacceptable performance supported by substantial evidence.

The dissatisfaction with the appellant's performance regarding both items 4 and 5 concern the fact that although he did indicate to Mr. Zagelow that he was having some problem meeting with the Regional Director and Deputy Regional Director, he did not indicate that this would prevent his timely completing the assignments. The appellant did not complete the project. I find these examples supported by the testimony from the agency officials involved. Accordingly, I further find these examples supported by substantial evidence.

The appellant has contended generally both with regard to his assertion that these examples are not supported by substantial evidence and his claim that he did not receive a reasonable opportunity to improve that these assignments were inappropriate. He contends that they are outside of the scope of his position description and not tasks which he is normally assigned. The appellant, nonetheless, agreed during his testimony that he has performed some of these tasks in the past. Furthermore, the first two items concern assignments which normally are done by the appellant's own team member, a lower-graded management analyst. I find that these assignments were appropriate for the appellant and that they might have been expected to be easily accomplished by him. I find the assignments outlined at items 4 and 5 well within the scope of the appellant's position.

Finally, the appellant contends that the agency committed harmful procedural error becausit used documents developed after it proposed the appellant's removal. The appellant was provided the material upon which the proposal to remove was based. The decision informed him that the deciding official, Mr. Topf, had considered the following:

> In the process of conducting my review of the specifications, I availed myself of the following documentation and other evidentiary sources: the above referenced 23 July, 23 August, and 9 September memorandums; a 17 September written reply to your 9 September memorandum (prepared by Mr. Zagelow); a series of informal "memorandums for the record" (also prepared by Mr. Zagelow); and the statements made by you and your representative during your oral reply on 14 September (although it was agreed at that time that your remarks would not be directly related to the substance of the specifications presented in the 23 August memorandum, but rather

were intended to present certain ancillary issues which you felt had the potential to mitigate the specifications). It should also be stated at this point that, in accordance with the ground rules which you established, neither Mr. Adachi nor Mr. Zagelow were permitted to be present for your oral reply; and it should be noted that your oral reply was made with your full knowledge that the time period stipulated for your replies in the 23 August memorandum had expired.

In addition to these sources, I questioned Mr. Miles M. Larson, Deputy Regional Director, and Ms. Marguerite A. Ray, Management Analyst, Financial Management Division, on matters where their personal knowledge could contribute to my determination of the propriety of the specifications. Finally, I conducted interviews with Mr. Akio Adachi, Regional Resource Manager, and with Mr. Zagelow in order to determine the factual nature of the specifications. Since both you and your representative specifically declined my invitation to meet with myself and Messrs. Adachi and Zagelow to further discuss the disagreements in your respective presentations (an invitation tendered at your "oral reply meeting" on 14 September), and since you have not provided me with the additional "memorandums for the record" which you indicated during the same meeting that you had been compiling throughout the course of this matter, I believe that I have considered all possible sources of information appropriate to this situation.

After receiving this decision, the appellant again requested all material relied upon to bring about his removal. This material include memoranda for the record and transmittals, and other material which were prepared after August 23, 1982. I find that the appellant, himself, states in his

closing argument that a number of these documents had no prejudicial impact. The other materials contain criticisms of his performance of which the appellants asserts he was unaware. To the extent that these documents relate to examples of unacceptable performance other than those discussed above, they have not been considered on appeal. As for the examples above, both parties were aware of what assignments were being cited and both have presented evidence and argument regarding the appellant's performance on them. I find no error by the agency in this regard. The higher level official who decides a performance action may conduct further review to fully appraise himself of the quality of the employee's performance and to fully consider what action he should take in the case. cf. *Peden v. U.S.* 512 F.2d 1099 (Ct. Cl. 1975). Further, in an action under 5 C.F.R., Part 432, an agency may decide not to take any action not only where the employee shows that his performance was unacceptable, but also where the employee can demonstrate that he has raised his performance to an acceptable level during the notice period and that this improvement outweighed the continued unacceptable performance preceding and during the opportunity-to-improve period. *See,* Federal Personnel Manual Letter 432-1, dated May 5, 1983. I find that since the appellant was furnished the additional material prior to filing the appeal, he had it for his use in preparing and prosecuting the appeal. The Board has stated that it is required to "consider de novo all the relevant presented by both parties, whenever developed." *Zeiss v. Veterans Administration,* 7 MSPB 516 (1981).

The Board has stated that in actions based upon unacceptable performance taken under 5 U.S.C. 7513 the Board will review the reasonableness of the penalty, as in any other conduct-related cases. *See, e.g. Brewster v. Navy,* MSPB Docket No. DC07528090248 (December 15, 1982). Such is not the case in the instant appeal. This action was taken under 5 U.S.C. Section 4303. Nonetheless, the re-

cord reflects that the agency did consider what action would be appropriate in this case. The decision outlines in some detail the reasons why the deciding official determined that demotion was not feasible. Further, the effective date of the decision was sent some sixty (60) days from the date of the decision to give the appellant further opportunity to seek other employment. I find that in the total circumstances of this case, the decision to remove the appellant does not exceed the bounds of reasonableness.

DECISION

The action removing the appellant is hereby AFFIRMED.

NOTICE

This is an initial decision and will become a final decision of the Merit Systems Protection Board on JAN - 3 1984 unless a petition for review is filed with the Board.

Any petition for review must be filed with the Board within thirty-five (35) calendar days after the issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management (OPM) and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The Director may request review only if he or she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule or regulation under the jurisdiction of OPM. 5 U.S.C. Section 7701(e)(2). The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulation.

The petition for review must be filed with the Office of the Secretary, Merit Systems Protection Board, 1120 Ver-

mont Avenue, N.W., Washington, D.C. 20419 no later than thirty-five (35) calendar days after issuance of this decision. If a petition for review is filed, an informational copy of it should be forwarded to this office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation

Any appellant adversely affected or aggrieved by the Board's final decision may obtain judicial review by filing a petition with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the Court within 30 days of the final Board decision. 5 U.S.C. Section 7703(b)(1).

For the Board:

Martha J. Lamphear
Presiding Official

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
SF04328310269

GARY J. KLIPPERT,

appellant,

v.

DEFENSE CONTRACT AUDIT AGENCY,

agency.

OPINION AND ORDER

The agency removed the appellant from his GS-12 position as a Management Analyst based on charges of unacceptable performance on one of the critical elements of his position. On appeal to the Board's San Francisco Regional Office, the presiding official sustained the removal action. The appellant has now filed a petition for review, and the agency filed a response in opposition to the petition.[1] The Board hereby GRANTS the petition for review under 5 U.S.C. Section 7701(e).

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[1] The appellant has filed a motion to reject the agency's response to his petition for review as untimely by several months. The agency represented in its response that the Board's order, which set the date on which the agency response, if any, must be filed, had been "misplaced" only recently "discovered." We find that the agency has failed to establish good cause for its untimely filing, *see Alonzo* v. *Department of the Air Force*, 4 MSPB 262, 264-65 (1980), and we shall therefore not consider the agency's response.

The appellant contends that the agency's deciding official improperly considered an *ex parte* communication. The communication is a ten-page memorandum to Bernard Topf, the agency's deciding official, from Gregory Zagelow, the appellant's immediate supervisor. *See* Agency File, Vol. III, Tab 8. The memorandum consists of a rebuttal to the appellant's statements made in a reply to the deciding official should not modify the removal to a demotion, and conclusory statements regarding the sufficiency of the appellant's allegations. Mr. Zagelow recommended removal "by sustaining the proposal in its entirety."

The memorandum in question also contains a discussion of the appellant's performance during an interim performance appraisal period, even though the appellant was charged with unacceptable performance only for the thirty-day period during which he was given an opportunity to improve. *See* Initial Decision at 7. The appellant was not provided a copy of this memorandum until after Mr. Topf issued the removal decision letter on behalf of the agency. The presiding official who decided this appeal found that this was not improper because the agency provided the appellant with this memorandum prior to his filing the appeal. *See* Initial Decision at 15.

The position of the appellant's supervisor as the proposing official does not *per se* make him an adversarial party for purposes of determining whether a prohibited *ex parte* communication occurred. There is no general prohibition that one involved in the agency's decision-making process (here the appellant's supervisor) be entirely removed from communicating with the deciding official once the process has begun. *Farris* v. *Department of the Air Force*, MSPB Docket No. BN07528410079 (January 31, 1985), *as clarified in Andersen* v. *Department of State*, MSPB Docket No. DC04328310838 at n.3 (April 24, 1985). *See Welcker* v. *United States*, No. 841392; slip op. at 11-12. (Fed. Cir. January 22, 1985).

We note that the appellant has not shown, nor are we aware of, any federal law, OPM or agency regulation which prohibits the communication involved in this case. *See also Depte* v. *United States,* 715 F.2d 1481, 1484 (Fed. Cir. 1983) (communication with an agency deciding official is not improper where no agency regulation requires evidentiary hearing or prohibits *ex parte* communications). The appellant has established that the deciding official considered allegations of unacceptable performance, in addition to those set forth in the notice of proposed removal, in reaching his decision to remove the appellant. Those allegations were contained in the memorandum from the appellant's supervisor to the agency's deciding official.

As the Board held in *Andersen, supra* at 5, in order to support an allegation that *ex parte* communications during the agency's decision-making process impaired an appellant's ability to defend against the agency's action, the appellant must show by a preponderance of the evidence that: (1) new allegations or information was considered by the deciding official which the appellant has not had the benefit of reviewing and responding to; (2) the deciding official was influenced by the new allegations or information in his or her decision-making process; and (3) the procedural error of considering the new allegations or information likely had a harmful effect upon the outcome of the action before the agency. We find that the appellant failed to prove that these factors existed in this case. *See Plath* v. *Department of Justice,* 11 MSPB 65 (1982).

The discussion in the memorandum regarding deficient performance, which occurred prior to the period of time upon which the appellant's removal was based, was written by the appellant's immediate supervisor in response to the appellant's specific assertions of satisfactory performance during the earlier period. The appellant made these assertions in reply to the removal proposal. Moreover, a copy of the appellant's interim performance appraisal relating to the earlier period was attached to the removal proposal

notice given to the appellant. In addition, the presiding official noted in her initial decision that, to the extent that these documents relate to performance deficiencies not specified in the removal proposal notice, the presiding official did not consider them in sustaining the agency's removal action.

With regard to the appellant's allegations that the agency committed harmful procedural error, we find that the he has failed to establish that any alleged errors would likely have affected the outcome of the action before the agency. *See Parker* v. *Defense Logistics Agency,* 1 MSPB 487, 492 (1980). With regard to the appellant's allegations that the presiding official committed error because she did not properly have certain evidence before her,[2] and because she ordered and considered a hearing transcript which the presiding official who conducted the hearing said he would not order, we find that the appellant failed to show that such alleged errors adversely affected his substantive rights. *Karapinka* v. *Department of Energy,* 6 MSPB 114, 115 (1981). *See also* 5 C.F.R. Section 1201.53(a) (a copy of a hearing transcript will be made available to a party upon request and upon payment of costs).

With regard to the appellant's assertion that the presiding official misinterpreted the Board's decision in *Siegleman* v. *Department of Housing and Urban Development,* 13 MSPB 27 (1983), we find that the presiding official properly interpreted that decision, despite any alleged factual error regarding the appellant's objection to his proposed standards. It is clear from the record that the agency did not abuse its discretion in establishing the performance standards under which the appellant was removed. *See Calloway* v. *Department of the Army,* MSPB Docket No. PH04328310029 (October 22, 1984). Although 5 U.S.C.

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[2] Such evidence consisted of documents read or otherwise observed by the presiding official who conducted the hearing and who allegedly refused to or did not expressly consider their admission into the record.

Section 4302(b) requires objective criteria in performance standards, this requirement is qualified by the phrase "to the maximum extent feasible." *See Shuman* v. *Department of the Treasury,* MSPB Docket No. SEO4328410073 at 6 (October 22, 1984). We can discern no reason for finding that the agency abused its discretion in assigning due dates for the appellant's projects based on the relative demands of each project assigned to the appellant.

The appellant also argues that under *Stintson* v. *Department of Justice,* 5 MSPB 49, 50 (1981), he is entitled to a hearing and an initial decision by the same presiding official. The Board's holding in *Stintson,* however, was that an appellant is entitled to a hearing and an initial decision by the same presiding official when hearing testimony on the material issues is conflicting. The appellant has not asserted here that the initial decision was based on credibility determinations in connection with conflicting hearing testimony, and our reading of the initial decision does not lead us to believe it was so based. We therefore find no merit to this argument.

Finally, the appellant contends that the presiding official erred in her interpretation and application of the substantial evidence test. It is clear from a reading of the initial decision, however, that the presiding official properly applied the substantial evidence test, and that the evidence the agency presented was sufficient to meet that burden. We find, therefore, that this argument, too, is without merit.

Accordingly, the initial decision dated November 29, 1983, is hereby AFFIRMED, and the appellant's removal is SUSTAINED.

This is the final decision of the Merit Systems Protection Board in this appeal. 5 C.F.R. Section 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. Section 7703 to seek judicial review, if the Court

has jurisdiction, of the board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.